Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

Cynthia A. Schultz
Petitioner

v.

Charles J. Sykes, Journal Broadcast Group, Inc.
and Journal Sentinel, Inc.

On Petition For Writ of Certiorari
To The Wisconsin Supreme Court

PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Under his "inherent powers," a Wisconsin trial judge, in the instant defamation civil case, conducted a four day criminal proceeding, in which the respondents were the prosecutors and that involved elaborate fact finding, to determine if Ms. Schultz attempted to commit the crime of subornation of perjury in a two year old immaterial criminal case and in the instant civil case. Upon finding that Ms. Schultz had "committed" attempted subornation of perjury and upon finding that there was no fraud on the court and "no prejudice" or "harm" caused to the instant case or to the Journal, the trial court invoked his "inherent powers" to "penalize" Ms. Schultz , to "deter future misconduct" and to "maintain (the court's) integrity." As punishment, the trial court took Ms. Schultz's and ALI's undefeated and affected defamation claims, that the Journal valued in the "multiple-millions of dollars" and that Judge Wasielewski confirmed "ought to have been heard by a jury" who "could well have come in with a substantial verdict," and gave those claims to the Journal - the prosecutors. At the close of the proceeding, the Journal prosecutors moved the court to award them attorney fees for prosecuting Ms. Schultz for attempted subornation of perjury, for prosecuting the motion to get their fees under §814.025 *Wis. Stat*. (the equivalent to the American Rule) and for fees to collect the anticipated judgment. Judge Wasielewski found that he could not award fees, according to statute, because no part of the case was frivolous or prejudiced and that there was no harm caused to the case or to the Journal. Thus, again, he invoked his "inherent powers" to impose, on top of the drastic sanction of dismissal, an escalating unconditional fine, not calibrated to damages, made payable to the Journal for their attorney fees, from August 24, 1999 up to the appeal to "penalize" Ms. Schultz and to "deter future misconduct." The trial court found that, although there were no actual losses sustained and that "no actual prejudice

occurred," the absence of damages would "not lie as a defense" because Ms. Schultz was being punished for "conduct which goes to the heart of our system. As a result, Ms. Schultz and the Animal Lobby, Inc. were made to be jointly and severally liable to the Journal in the amount of $168,944.97 for the Journal fees that included all of the Journal's costs for the entire case and legal fees from August 24, 1999 to March 27, 2000. In addition to the purely punitive sanction of dismissal and the award of attorney fees to the Journal for serving as prosecutor in the criminal proceeding and for litigating to get their fees for serving as prosecutor, Judge Wasielewski again invoked his "inherent powers" to make the Animal Lobby and Ms. Schultz liable for the Journal attorney fees for "as long as this issue is alive, until there is a final judgment entered from which no appeal is taken" as punishment for Ms. Schultz and the Animal Lobby exercising their statutory right to appeal his decisions. Ms. Schultz and ALI appealed to the Wisconsin Court of Appeals on the grounds that the trial court violated her 5th, 6th and 14th Amendment due process rights by conducting a criminal proceeding and finding Ms. Schultz guilty of a crime without providing her with notice, a jury, an independent prosecutor and the beyond a reason doubt standard of proof, that the trial court violated the 8th Amendment's cruel and unusual punishments clause by imposing sanctions that were grossly excessive and for the benefit of the interested Journal who served as the prosecutor in the criminal proceeding; and that Judge Wasielewski violated Ms. Schultz's 14th Amendment due process rights by failing to act as an impartial and unbiased magistrate. The court of appeals upheld all of Judge Wasielewski's sanctions concluding that the "severe" and "drastic" sanctions did not have to be calibrated to damages "because the court's ability to maintain judicial integrity was compromised regardless whether the Journal was harmed" [Pet:17] and that Judge Wasliewski could impose sanctions, not calibrated to damages, to "maintain his dignity" in both

this civil case an in another criminal case. [Pet:11,15,16] The appeals court also held that Ms. Schultz's due process rights were not violated because the sanctions were "so severe" and the allegation of misconduct was "so serious," due process required no more than an "evidentiary hearing" in which guilt needed not be established beyond a reasonable doubt because "no criminal complaint issued, no loss of liberty was at stake, and no criminal jeopardy attached." The court of appeals, however, could not find a reason why Judge Wasielewski entered a $168,944.97 judgment against the Animal Lobby, Inc. and took their valuable cause of action. Therefore, they remanded the Animal Lobby's claims to have the trial court impute Ms. Schultz's guilt on to them after they re-dismissed one of the Animal Lobby's claims by making an erroneous finding of fact. Ms. Schultz and ALI petitioned for review with the Wisconsin Supreme Court. The Wisconsin Supreme Court denied the review.

QUESTIONS PRESENTED

Were Ms. Schultz's constitutional rights to a jury trial, under U.S. Const. Art. III, Sec. 2 and the 6th Amendment, violated when the civil trial judge, in the instant defamation case, invoked his "inherent powers" to conduct an elaborate fact finding proceeding to determine if Ms. Schultz was guilty of an attempt to suborn perjury from a party who was immaterial and not proffered to the court as a witness?

Were Ms. Schultz's due process rights violated when the Journal lawyers served as the prosecutors in the proceeding that was intended to establish Ms. Schultz's guilt of a crime and to penalize her with the taking of an undefeated and unprejudiced civil defamation action?

Was it a violation of Ms. Schultz's constitutional rights for the trial court to invoke its "inherent powers" to "penalize" Ms.

Schultz for criminal conduct it found happened in front of another tribunal?

Was it a violation of the Fifth Amendment for the trial court, without the procedural protections of a criminal trial, to take Ms. Schultz's cause of action, that the court concluded was not prejudiced and that "ought to have been heard by a jury," and give that cause of action to the Journal to "penalize" Ms. Schultz and to "maintain the court's dignity"?

Was it a violation of the Fifth Amendment for the trial court to invoke his "inherent powers" to deprive Ms. Schultz of her inviolate right to a civil jury trial, guaranteed by *Wisconsin Constitution, art. I, § 5*, to penalize her for attempted subornation of perjury?

Were Ms. Schultz's constitutional rights violated when the trial court invoked his "inherent powers" to punish her for exercising her statutory right to appeal with the sanctions of Journal fees for "as long as this issue is alive, until there is a final judgment entered from which no appeal is taken?

Does a state trial court have the "inherent power" or jurisdiction to award attorney fees for an appeal to this Court?

Was it a violation of Ms. Schultz's procedural due process rights to have the burden of proof standard decided by the Journal after the criminal proceeding in which they were the prosecutors?

Did the court of appeals violate Ms. Schultz's due process rights by making prejudicial erroneous findings of facts that were contrary to the trial court record?

Did the trial court violate Ms. Schultz's constitutional rights when he based an increase in his punishment of her on her refusal to admit to a pre-litigation subornation of perjury in another case?

Was it a violation of Ms. Schultz's constitutional rights when the trial court invoked his "inherent powers" to punish Ms. Schultz with an award of Journal attorney fees that were not calibrated to damages and that were to prosecute her and their motion to dismiss the case?

Did the court of appeals deprive Ms. Schultz of her statutory right to appeal the nature of the proceedings in the trial court by ignoring Ms. Schultz's challenges to the proceedings as being criminal in nature and by ignoring her challenges to the sanctions as being grossly excessive and in violation of the 8th Amendment?

What is the standard of review of a trial court's ruling on a challenge to the constitutionality of a sanction proceeding conducted under the trial court's "inherent authority?"

Did the sanctions in this case violate the cruel and unusual punishment clause of the 8th Amendment?

PARTIES TO THE PROCEEDING

Cynthia A. Schultz is the Petitioner.

Charles J. Sykes, Journal Broadcast Group, Inc. and Journal Sentinel, Inc., are the Respondents.

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Cynthia A. Schultz, respectfully prays that a writ of certiorari issue to review the decision of the Wisconsin Court of Appeals, District 4, dated October 4, 2001 (published) and the denial of the Petition for Review thereof by the Wisconsin Supreme Court dated January 29, 2002.

OPINIONS BELOW

The decision of the Wisconsin Supreme Court dates January 29, 2002 denying the Petition for Review is reprinted at Pet: 1-2 of the Appendix to this Petition. The opinion of the Wisconsin Court of Appeals, District 4 dated October 4, 2001 is reprinted at Pet:8-36 of the Appendix to the Petition.

JURISDICTION

The Wisconsin Supreme Court on January 29, 2002 issued its Order denying the Petition for Review and thereby affirming the decision of the Wisconsin Court of Appeals, District 4 entered on October 4, 2001. The jurisdiction of the United States Supreme Court to review the decision of the Wisconsin Supreme Court is found at 28 U.S.C. § 1257 (a).

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CONSTITUTIONAL PROVISIONS AT ISSUE

Article III, Section 2 of the United States Constitution provides, in relevant part: "trial of all crimes...shall be by jury..." U.S. Const. Art. III, Sec. 2

The Fifth Amendment provides, in relevant part: "No person shall be held to answer for an...infamous crime, unless on a presentment or indictment of a grand jury...nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb...nor be deprived of life, liberty, or property, without due process of law...."

The Sixth Amendment provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...to be informed of the nature and cause of the accusation...to be confronted with the witnesses against him..."

The Eighth Amendment provides, in relevant part: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment provides, in relevant part: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Ms. Schultz is a political consultant who has run many campaigns for candidates for the U. S. Senate and for Wisconsin's appellate and supreme courts. In addition, Ms. Schultz founded two non-profit animal protection organizations – the Animal Lobby, Inc. and the Wisconsin Society for the Prevention of Cruelty to Animals, Inc.[1]

The Milwaukee Journal Sentinel is Wisconsin's major newspaper and the only daily in Milwaukee. Journal Broadcast Group, Inc. owns WTMJ Radio which broadcasts throughout Wisconsin. Charlie Sykes, the spouse of former Journal reporter and present Wisconsin Supreme Court Justice Diane Sykes, hosts a WTMJ talk show. Journal Sentinel, Journal Broadcast Group and WTMJ Radio are all owned by Journal Communications, Inc.[2]

In January of 1996, Ms. Schultz, while working for appellate court Judge Ralph Adam Fine, stung the Journal Sentinel by publicly questioning the Journal's ethics of giving valuable free pre-election endorsement advertising to the judicial candidates deciding the many Journal cases. Consequently, the Journal had to publish an embarrassing apology for not informing its readers of a conflict of interest that it had with a judicial candidate. [217] At this same time, two sickly dogs were living outside in sub-zero temperatures without food, water and shelter. When police ignored the Humane Officer's finding that the dog owners had violated §951.13(1) Wis. Stat. [Pet:100][A:AP:310-317], the dogs were taken from their yard and Ms. Schultz's recent contacts with neighbors and others made her a suspect in aiding in the rescue. The dognapping was not a police priority until the Journal began a series of

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[1]We will refer to the Wisconsin Society for the Prevention of Cruelty to Animals, Inc. as the WSPCA and the Animal Lobby, Inc. as ALI.

[2]We will refer to Sykes, Journal Broadcast Group and the Journal Sentinel as the Journal unless otherwise noted.

front page stories reporting that Ms. Schultz had victimized the dogs' owners by stealing their healthy dogs, who authorities found were "not mistreated," because she and "animal rights vigilantes," who once had a dog "killed and carved up to get publicity," thought it was "cruel" to keep animals outside. [A-AP:282-296] Charlie Sykes and WTMJ Radio pressed authorities to prosecute Ms. Schultz and attacked Judge Fine for lacking the integrity and good judgment to fire her. In at least 12 radio broadcasts, Sykes reported that Ms. Schultz had "lied" about filing a campaign finance report, had "committed a felony," had conducted a year long "campaign of harassment" against the owners of the "well cared for dogs" who he claimed she took and put in harms way much like she and ALI had done when "they had a dog killed and carved up to prove a political point and to get publicity." [A-AP:203-281] While it was true that Ms. Schultz was suspected of being a party to the misdemeanor dognapping of two malnourished dogs, the aforementioned collateral reporting was false and it was that collateral reporting that constituted the defamations in this action.

The Journal ultimately goaded the District Attorney into referring the misdemeanor to a special prosecutor in a distant county. On May 21, 1996, Ms. Schultz was charged with being a party to the misdemeanor of dognapping, *§951.03 Wis. Stat.*, [Pet:101] The Journal continued to pressure authorities to pursue Ms. Schultz [131:Ex.13:89] until December of 1997 when the special prosecutor dismissed the charges saying that it would be a violation of the state's "ethical obligation" to proceed to trial when the "State's case in chief significantly fails to establish proof beyond a reasonable doubt." [A-AP:318-19] Neither the Journal Sentinel nor Sykes, the only media reporting on the dognapping, reported the dismissal.

Before charges were filed, Ms. Schultz and ALI notified WTMJ of a potential defamation action and requested that the tapes of the slanderous broadcasts be preserved and provided pursuant to *47 C.F.R. §§ 73.1920*.[Pet:102][A-AP:325-26] WTMJ provided some tapes but destroyed others. [A-AP:327] Ms.

Schultz and ALI also notified the Journal Sentinel of the defamations pursuant to §895.05(2) Wis. Stat.[Pet:104].[3] The Journal Sentinel ignored the notices and repeated the libels [A-AP:320-24;332-37].

On January 28, 1998, Ms. Schultz and ALI filed this defamation action [2]. In June, the court ruled that both were "limited purpose" public figures and that they had to prove actual malice [A-AP:193-202]. Ms. Schultz conceded that the misdemeanor charge prevented her from proving that Sykes acted with actual malice when he repeatedly reported that she had committed a felony [24]. While the court found many of the Sykes' slanders, surrounding the dognapping, "troubling" and considered it a "close[r] call" as to whether actual malice could be proved even with the dognapping charges and Ms. Schultz's acknowledgment of "being involved in the post theft" of the dogs [Pet:44-46], he granted summary judgment on all but two counts of defamation where Sykes and the Journal falsely reported that Ms. Schultz and ALI had a dog killed and butchered to get publicity and to prove a political point. [Pet:50-52]. In June of 1999, right before the jury trial, a new judge, Francis Wasielewski, rotated onto the case. The Journal immediately filed a second summary judgment motion, that was identical to the first denied a year earlier by a different trial judge [85], claiming again that, because Ms. Schultz was involved in dognapping two abused dogs, she could not have been defamed by the Journal's false reports that she had a dog killed and carved up to get publicity. While Judge Wasielewski was deciding this second summary judgment motion, the Journal filed another motion asking him to use his "inherent power" to dismiss the dog killing defamation claims because the Journal had evidence proving that Ms. Schultz was guilty of the dognapping [98].

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[3]The court of appeals re-dismissed ALI's claim against the Journal Sentinel, after re-instating and remanding ALI's claims, by making an erroneous factual finding that ALI did not send the mandatory notice that was sent and in the appendix of ALI's appellate court brief. [Pet:35-36]

Supporting the Journal motion to dismiss, was the affidavit and deposition testimony of five time convicted felon, Clary Engel. Ms. Schultz met Engel in late 1995 when the WSPCA responded to a televised plea for money to fix Engel's dog's leg. The WSPCA paid a vet to perform surgeries on the dog but stopped funding the dog's after care when Engel attempted to persuade the vet to give him the money that the WSPCA paid to the vet to help his dog [A:AP:463]. Engel dumped his dog but admitted that he continued to "watch the Journal to see what was coming up next" on Ms. Schultz [197:82-83]. Engel was listed as a possible witness in the dismissed criminal dognapping case after he told Ms. Schultz's attorney that he over heard her telephone conversations on the day of the dognapping. As her attorneys confirmed she did with all of her witnesses in the dognapping case, Ms. Schultz interviewed Engel, made notes of what he told her and gave those notes to her attorney and to Engel. [B:AP:1059,1063][4] In August of 1998, Engel and Ms. Schultz's defamation lawyer went back and forth about signing an affidavit to memorialize a conversation he had with the same lawyer.[5] Engel never kept an appointment to finalize the affidavit and the issue was dropped. [B:AP:1001] On September 24, 1998, the day that the Journal Sentinel publicized that this defamation case was

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[4]Judge Wasielewski later found that these notes were an attempt to suborn Engel's perjury in the criminal dognapping case. The court of appeals held that *Chambers v. Nasco, Inc.*, 501 U.S. 32, 57 (1991) authorized the court's use of his "inherent power" to sanction conduct in front of another tribunal [Pet:18] and relied on these notes, drafted for Ms. Schultz's attorneys in the old dognapping case, to uphold sanctions, in the instant case, for conduct that Judge Wasielewski found was "fraudulent" in the old criminal case.[Pet:28]

[5]Engel testified that he never had the conversation [Pet:426-27]. Telephone records proved that he called Ms. Schultz's lawyer and had a lengthy conversation. Judge Wasielewski didn't believe Engel's testimony that he didn't have the conversation [Pet:64] but believed Engel's testimony that the attempt to set out the conversation in an affidavit, that Ms. Schultz never saw and that Engel never signed, was really an attempt to suborn his perjury. Thus, this was the second attempt to suborn Engel's perjury that Judge Wasielewski later found.

going
to trial, Engel called Ms. Schultz asking if he would be a witness in the defamation case [A-AP:296; 216:Ex.101-10]. Ms. Schultz told him that he would *not* be a witness in the civil case as Engel later testified [130:Ex.8:50-51]. A year later, in August of 1999, a Journal subpoena to depose Engel set off a flurry of calls from him. He first called Ms. Schultz and intimated that he should get something to testify at the deposition if he was going to get "crossways with a judge [Charlie Syke's wife]." [200:125][198:91-92]. When Ms. Schultz didn't bite, he next called Sykes and the Journal Sentinel to get money from them [A-AP:394]. After getting no response from Ms. Schultz and after getting himself in deep with the Journal,[6] Engel, who was on probation for a burglary and felony firearm conviction, next called his friend, Assistant U. S. Attorney Joe Wall. He told Wall that he had saved the "talking points" that Ms. Schultz had given to him and to her attorney two years earlier in the criminal dognapping case thus proving that Ms. Schultz had tried to suborn his perjury in that case [200:86]. Wall, who was running for Circuit Court Judge and looking for the valuable free Journal advertising and money from the lawyers in the large Journal firm,[7] escorted Engel to a meeting with the Journal lawyers where the Journal made the deliberate decision to incur extra costs by suppressing Engel's disclosures from the independent scrutiny of law enforcement and from Ms. Schultz [B:AP:1021-22]. A Journal lawyer testified: "I did not believe that to report it to the police or the District Attorney at the time was in the best

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[6]The court of appeals found Engel's extortion attempts to be only "troubling." [Pet:27] The court of appeals, however, did not have the benefit of yet to be discovered evidence that has only recently brought into question the propriety of a Journal lawyer's involvement in a delivery of a cash payment to one of Engel's creditors. [Pet:457-61]

[7]After Wall's help, the Journal gave Wall free advertising by promoting him on WTMJ and in the Journal Sentinel's free pre-election endorsement advertisement. The Journal lawyers and Judge Wasielewski also helped Wall, a Journal witness, by publicly endorsing and soliciting money for him. [Pet:301,Ex:C]

interest of my client....and that *no harm* would be done by the delay, but that my clients' interest were best served by my doing what we did." [210:52] During the Journal meeting, Engel agreed to tape Ms. Schultz to get evidence to support his claims and to postpone his following day's deposition to give the Journal more time to wangle with his testimony [Pet:388-91]. After the meeting, the Journal engaged in a series of ruses that prevented Ms. Schultz from halting any further tampering with the testimony of this multiple convicted felon who had already asked both the Journal and Ms. Schultz for money [200:87,91-94]. They first called Ms. Schultz's lawyer and pretended that Engel had called to postpone the following day's deposition after he "had to go to the hospital" upon finding his girlfriend "inside the ambulance" [A:AP:535] [126:14] [210:45-47]. During the eight days between the postponed deposition and the rescheduled deposition, Engel refused to tape record a conversation with Ms. Schultz and met again with Journal lawyers to orchestrate the testimony he would give on camera in the new deposition [A:AP:536]. On the day before his new deposition and immediately after another meeting with Journal lawyers, Engel made multiple unprovoked calls to Ms. Schultz [A:AP:417-423]. When he finally reached her on the morning of his deposition, Engel tried to extort $2000.00 from her to keep him from putting on a "big performance"[202:116-117]. Ms. Schultz convinced Engel to meet her at her lawyer's office before the deposition. Engel agreed and was waiting for Ms. Schultz when she arrived at her lawyer's office but would not go inside. Instead, he first asked her for money again and then backed off blaming his erratic behavior on his financial problems [202:120-121]. Having put Ms. Schultz in the position of either turning Engel in for extortion or believing that his bizarre behavior was the result of his financial problems, Engel proceeded to the Journal lawyers' office where he waited in their private offices for his deposition [A-AP:431, 211:15]. Engel never told the Journal lawyers that he had made multiple calls to Ms. Schultz, that he met her at her lawyer's office that morning or that he asked her for money. [98:95-96]

At the deposition, Engel testified that he was "surprised" to receive the Journal subpoena because Ms. Schultz had told him that he would not be a witness in the civil case [130:Ex.8:50-51] and he furthered the Journal ambulance ruse by lying about postponing his deposition after finding his girlfriend in an ambulance [A:AP:535-536]. Likewise, Engel lied to conceal his calls to get money from the Journal and Sykes [A:AP:544-545]. Sometime later, Engel gave the Journal a version of events of the morning of his deposition [A-AP:496]. That version was set down in a September 13th Journal affidavit in which Engel testified that Ms. Schultz had *called him* on the morning of his deposition to get him to meet her so that she could suborn his perjury again by giving him a "script" that he could not produce [B-AP:974-979].[8] On September 27th, the Journal received telephone records, subpoenaed by Ms. Schultz, proving that Ms. Schultz did not call Engel but that Engel had called her [216:ex:108]. Immediately, the Journal had Engel sign a new affidavit that edited out Engel's lie about Ms. Schultz calling him but that still contained the lie that Engel did not tell the Journal of his meeting with Ms. Schultz because "he got to the offices of Foley and Lardner at 2:35 P.M., late for his deposition" [98:95-96]. This false affidavit and false deposition testimony were proffered to the court in support of the Journal motion to dismiss that also concealed Engel's attempts to get money from them, his refusal to get taped evidence of his claims and his attempts to lie in the attached Journal affidavit [97]. Ms. Schultz denied the Journal accusations and objected to a hearing and to the dismissal [101]. Judge Wasielewski ordered an "evidentiary hearing" on the Motion to Dismiss and denied the Journal's second motion for summary judgment finding that, being that he was the "fourth judicial officer to take a look at this," he too

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[8]Judge Wasielewski found that this was the third attempt, by Ms. Schultz, to suborn Engel's perjury.

believed that actual malice could be proved [Pet:54][9].

During the weeks leading to the proceeding, the Journal spent tens of thousands of dollars on calls, prep sessions and on a five hour mock trial [B:AP:970-1000] to further spoil the testimony of Engel who, after asking them for money, had already lied to help the Journal in both his deposition and in two affidavits. On January 10, 2000, over Ms. Schultz's repeated objections that Judge Wasielewski and the Journal were "turning this hearing into a criminal trial" on the dognapping "that doesn't involve anything that is involved in this civil lawsuit at this present time"[1400:42] [197:25], the court embarked on four days of elaborate fact finding to determine whether Ms. Schultz was guilty of the 1996 dognapping, of attempting to suborn Engel's perjury in the 1996 dognapping case and of attempting to suborn Engel's perjury for an affidavit and for his deposition in the civil case. The proceeding began as a "preliminary evidentiary hearing" under §901.04 *Wis. Stat*. [Pet:106-08]. As it progressed, Judge Wasielewski repeatedly called the proceeding a "trial on the issue of suborning perjury"[Pet:81] in what he referred to as being a "suborning perjury case" [208:31] and selectively and confusingly applied the criminal rules of evidence that are applicable to a criminal jury trial.[10] While the "preliminary

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[9]The court of appeals reasoned that Judge Wasielewski's repeat of the decision of three other judicial officers to deny the Journal motion for summary judgment, demonstrated that he was not trying to end run a jury when "it would have been much easier for the circuit court to simply deny the Journal's motion to dismiss, allow the jury to sort everything out, and perhaps refer the Journal's allegations to the district attorney's office" [Pet:21]

[10] §901.04(1) *Wis. Stat*. [Pet:106] provides that the rules of evidence are relaxed in evidentiary hearings where trial courts are not bound by them. The court of appeals, however, relied solely on case authority, appropriate only to criminal jury trials, to uphold Judge Wasielewski's selective application of the criminal rules of evidence in the proceeding that was supposed to be an "evidentiary hearing." The court of appeals also based their decision on their erroneous conclusion that because Engel had been truthful about the number of times he was convicted of a crime "no further

evidentiary hearing"was to determine the admissibility of evidence, Judge Wasielewski conducted a separate "evidentiary hearing" to decide what evidence could be brought into the "evidentiary hearing" and, at the Journal's request, sealed Clary Engel's public criminal records in violation of §19.35 Wis. Stat. [Pet:109][A-AP:358-62] After days of confusing and elaborate fact finding on the same dognapping evidence put forth in both Journal motions for summary judgment, Judge Wasielewski concluded that his "inherent powers" authorized him to deprive Ms. Schultz and ALI of their state constitutional and statutory rights to a jury trial in their civil case[11] based on whether "we believe Clary Engel or do we believe Cynthia Schultz" on whether Ms. Schultz "committed perjury" and "suborned perjury" [Pet:60,389]. Ms. Schultz instructed Judge Wasielewski that the criminal nature of his decision required that a jury establish her guilt "beyond a reasonable doubt"[Pet:390-92]. Judge Wasielewski did "not think suborning perjury is a crime" and, for the first time, established that he would use the middle burden of proof after the Journal told him what burden they thought they had met [Pet:395].[12] Ms. Schultz also again demanded a jury "under the Constitution of Wisconsin and the Constitution of the United States" [Pet:396]. Judge Wasielewski, however, "deem[ed] that a jury ha[d] been

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inquiry was permissible" [Pet:24]. Ms. Schultz's brief to the court of appeals clearly pointed out the instances, in the record [Pet:249,264], where Engel repeatedly lied about the number of times he was convicted of a crime [Pet:428-36] and the court of appeals recognized that fact when it contradicted itself later in its own opinion. [Pet:26].

[11]The *Wisconsin Constitution, art. I, § 5* [Pet:116] and *§ 805.01(1), Wis. Stat.*, [Pet:117-18] guarantee the inviolate right to a jury trial to one who has paid the jury fee as Ms. Schultz and ALI timely did in this case [B-AP: 968-69].

[12]Perjury is a class D felony [*§ 946.31, Wis. Stats.*][Pet:118]. Solicitation a class D felony [*§§ 939.30 and 939.31, Wis. Stats.*] [Pet:119-20] The penalty for an attempt is one-half the completed crime. [*§ 939.32 Wis. Stats.*][Pet:121]

waived" because Ms. Schultz participated in the court ordered proceeding[Pet:396-97]. Also, for the first time, Judge Wasielewski informed Ms. Schultz that, because "credibility has been at the very bottom of this whole thing," summary judgment methodology did not apply [Pet:396].[13] Ultimately, Judge Wasielewski concluded that Ms. Schultz had attempted to suborn Engel's perjury by giving Engel the notes in the 1996 dognapping case that never went to trial, in an affidavit in the civil case that Ms. Schultz never saw and that Engel never signed to memorialize a conversation with Ms. Schultz's lawyer that Engel testified he never had but that Judge Wasielewski found he did have and by giving Engel a script of perjured testimony, on the day of his deposition, that he could not produce. Judge Wasielewski further concluded that, although the alleged attempts to suborn perjury caused "no prejudice" to the case or to the Journal [Pet:71],[14] his "inherent powers" authorized him to "penalize" Ms. Schultz to "deter future misconduct" [Pet:70,80] and to "maintain [the court's] integrity" [Pet:72].

Without any restraint on his use of his "inherent power" without any attempt to isolate out the punishment for the alleged pre-litigation subornation of perjury that he found occurred in another criminal case, Judge Wasielewski took Ms. Schultz's and ALI's valid causes of action that the Journal valued in the "multiple-millions of dollars" [208:45, 212:101-03,210:64] and that Judge Wasielewski confirmed "ought to have been heard by a jury" who "could well have come in with a substantial verdict" [Pet:93], and gave those causes of action to the Journal – the prosecutor.

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[13]When Ms. Schultz objected to not having noticeof the standards being used to conduct the proceeding, Judge Wasielewski smugly replied: "You never asked." [Pet:400]

[14]The court of appeals found "whether the Journal was prejudiced is also not a factor that the circuit court was required to consider. The court's ability to maintain judicial integrity was compromised regardless whether the Journal was harmed." [Pet:17]

After Judge Wasielewski imposed the first drastic punishment of dismissal without rendering findings of fact or conclusions of law at the Journal suggestion that such findings would only be "gilding the lily" [Pet:72], the Journal moved the court to find the case frivolous and to award them $470,000.00 in fees, under *§ 814.025, Wis. Stat.*[Pet:72,123] Ms. Schultz moved for reconsideration on the grounds that her procedural due process rights were violated by the "mini-trial guised as an evidentiary hearing:"

> "The mini-trial, conducted in this case, deprived Ms. Schultz of her constitutional rights to a trial by jury. No charges were brought. No complaint was issued. All of the constitutional and legal protections afforded to a defendant, which was just what Ms. Schultz was in this mini-trial, were ignored." [126:9]

Ms. Schultz also asked that the Journal be sanctioned, under *§802.05 Wis. Stat.*,[Pet:125] for wilfully proffering Engel's false affidavit and deposition testimony to the court [126:35]. Judge Wasielewski denied the motion and request for sanctions "out of hand" [207:2] and, under his "inherent powers," issued an injunction preventing Ms. Schultz and ALI from spending any of their assets [206:17-38,167]. Ms. Schultz petitioned the court of appeals to exercise supervisory jurisdiction to restrain Judge Wasieliewski's use of his inherent powers by stopping him from exacting more punishment and to determine if the "due process and equal protection clauses of the respective Constitutions [had] been flagrantly offended"[Pet:402-13]. The petition was denied six days later by a panel of three appellate court judges from both the 1st and 4th District courts of appeals[15] [164; 208:2-3].

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[15]Although the District I court of appeals had jurisdiction over the appeal, the withdrawal of District I judges Fine and Schudson necessitated the inclusion of District III Judge Cane as the third judge on the panel. Judge Cane withdrew, without reason, after making one decision, and District IV Judge Vergeront became the third judge on the panel with District I Judges

After again finding that no part of the case was impacted by or made frivolous by anything that came out of the proceeding, Judge Wasielewski determined that fees and costs could not be awarded to the Journal under §814.025 Wis. Stat. [Pet:78, 123] As part of his reasoning, Judge Wasielewski determined that there was no harm caused because, even if Engel would have been proffered to the court as a witness, he would have been an unimportant witness being that Ms. Schultz "did not intend to rely on Mr. Engel" as a witness [Pet:77].[16] Judge Wasielewski also decided that, although the alleged attempt to suborn perjury was "evidence of consciousness of guilt," he could not establish Ms. Schultz's "guilt with respect to the dognapping" and referred the dognapping case to the District Attorney who declined to prosecute [Pet:77-80]. Nonetheless, upon deciding again that there were no actual losses sustained and that "no actual prejudice occurred," Judge Wasielewski concluded that the absence of damages would "not lie as a defense" because Ms. Schultz was being "penalized" for "conduct which goes to the heart of our system" [Pet:81] and again used his "inherent powers" to impose, on top of the drastic sanction of dismissal, an escalating unconditional fine that covered the Journal's attorney fees[17] from August 24, 1999, the day the Journal claimed they first met Engel, for "as long as this issue is alive, until there is a final judgment entered from which no appeal is taken"[Pet:83-85].[18] Next, Judge Wasielewski

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Wedemeyer and Curley. Therefore, Judge Wedemeyer, Curley and Vergeront made this decision.

[16]The court of appeals misstated these facts in the record when it said that it "believed with good reason" that "the circuit court did not accept Schultz's assertion that Engel was an unimportant witness..." [Pet:17]

[17]Wisconsin adheres to the "American Rule." Watkins v. LIRC, 117 Wis.2d 753, 758 (1984) and does not recognize the bad faith exception to the American Rule. Arneson v. Continental Insurance Company, 158 Wis. 2d 728, ***12 (1990), unpublished opinion.

[18]§ 808.03(1), Wis. Stat., provides a statutory right to appeal. [Pet:128]

conducted a hearing to determine if the Journal's attorney fees, not measured to damages, were reasonable under *Wis. Supreme Court rule 20:1.5(a)* [Pet:134-36]. Relying on his reasoning that Ms. Schultz should not be "the one to profit" from calibrating the fees to damages, Judge Wasielewski refused to exclude fees that were not only not calibrated to damages but also not calibrated to prosecuting Ms. Schultz and the Journal motion to dismiss. The Journal lawyer acknowledged that, in addition to getting paid to prosecute Ms. Schultz, the Journal judgment was to include their fees "to obtain this judgment and to collect it"[211:46,73][19] and to prosecute "the motion for fees on one ground or another" [Pet:84]. Included in the punitive sanction of attorney fees were fees that resulted from the Journal's deliberate decision to not mitigate their expenses after a Journal lawyer told Judge Wasielewski that the expenses, generated by tampering with Engel's testimony, were necessary because "there was a risk that those claims would go to a jury" and "defamation lawyers don't like juries" so "when Mr. Engel came forward with his report that Ms. Schultz had attempted to suborn his perjury, it presented us with a good opportunity to avoid a jury." [Pet:415] Judge Wasielewski agreed that, because "it doesn't get much better" than the Journal not having to "risk going in front of a jury and defending themselves on this case," Ms. Schultz and ALI would be jointly and severally liable to the Journal in the amount of $168,944.97[20] to cover all of the Journal's attorney

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[19]Without considering the nature of the legal work itemized in the Journal billing records contained in Ms. Schultz's appendix to her brief, the court of appeals erroneously found that "because the fees did not exceed the amount the court determined had been incurred by the Journal [for something] and the award was paid to the Journal, not the State," the fees, that were to "penalize the offender," were not punitive. In direct conflict with the record, the appeals court also erroneously found that the monetary sanction did not exceed "...the amount the Journal incurred in prosecuting its motion to dismiss." [Pet:32]

[20]This amount does not include attorney fees for all ofthe appeals including this appeal to this Court or the 12% interest accruing on the judgment that is now over $200,000.00 even with the weekly garnishment of

fees from the day they met Clary Engel up until the appeal [Pet: 93-94]. Ms. Schultz objected to the gross excessiveness of the punishment and Judge Wasielewski reasoned that the punishment would have been much less if Ms. Schultz would have admitted that the notes, that she prepared for her attorney in the criminal dognapping case, were really to suborn Engel's perjury in that case [Pet:418]. As an additional sanction, however, Judge Wasielewski *sua sponte* punished Ms. Schultz and ALI for exercising their statutory right to appeal by ordering that they pay the Journal attorney fees for "as long as this issue is alive, until there is a final judgment entered from which no appeal is taken"[Pet:83]. At the close of the hearing, the plaintiffs attempted to have the court consider their assets. They provided an expert report that contained financial information that Ms. Schultz supplied to the expert.[21] Ms. Schultz testified that, while she could not testify to the expert's conclusions, she was competent to testify to the accuracy of the financial data that relied on her own tax returns on which she had personal knowledge. The court again applied the rules of evidence, applicable to a jury trial, and refused to consider the financial information [Pet:293-98]. Ms. Schultz again petitioned the court of appeals to exercise it's supervisory power to halt Judge Wasielewski's use of his "inherent power" in his continued vindictive pursuit of Ms. Schultz and in violation of her constitutional rights. Four days later, the court of appeals refused the request and Judge Wasielewski appointed a receiver to liquidate Ms. Schultz's assets [183].

Mr. Schultz's wages and without the appellate fees and costs yet to be added to the judgment.

[21] Although the court of appeals recognized that the trial court was required to "reflect upon equitable considerations in determining the amount of the sanction," their opinion erroneously stated that Ms. Schultz testified that she was not familiar with the financial information in the reports [Pet:32-33] when the record demonstrated the opposite [Pet:293-98] and when Ms. Schultz cited to that record in her brief. [Pet:212-13]

The Journal defamations had already damaged Ms. Schultz and the Animal Lobby, Inc. to where neither had any assets and Ms. Schultz filed bankruptcy. Judge Wasielewski rotated off the case in July of 2000. In a hearing, in front of a new judge, to determine what portion of Mr. Schultz's wages could be garnished[22] and to decide how the Journal was to proceed in taking Mr. Schultz's home, the Journal argued that the judgment was not the result of "injury to another person" but was "a penalty or a fine" for "misconduct before the court" where "the court was in a sense the victim" [Pet:421]. Judge Dugan, the new judge on the case, determined that the only case law that he could "possibly find controlling is if there was some case law saying that, in a situation where someone committed a crime,"only the "criminal's interest" in the marital estate would be available to pay the fine [Pet:423]. Ultimately, Judge Dugan found that granting the Journal motion to take Mr. Schultz's home would violate due process but permitted the Journal to garnish Mr. Schultz's wages.

Ms. Schultz and ALI filed separate appeals [Pet:195-292]and briefing in the court of appeals concluded on January 31, 2001. On March 15, 2001, after denying three plaintiff motions, the two District I appellate court judges disqualified themselves, without providing the explanation required by *§757.19 Wis. Stat.*[23] [Pet:132-33] District IV Judge Vergeront, the third judge, shifted in to replace Judge Cain, who shifted out after being shifted in to replace Judge Fine or Judge Schudson, did not withdraw from the case and the entire case was sent to District IV where Judge Dykman and Judge Lunsten replaced District I Judges Wedemeyer and Curley who withdrew without giving a reason. The panel now was composed of District IV judges Dykman, Lunsten and Vergeront.

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[22]Mr. Schultz was not a party to the defamation action and appealed the garnishment action separately [Pet:377-86].

[23] *757.19(5) Stat.*[Pet:133] requires that, when a judge is disqualified, the judge shall file in writing the reasons for the disqualification. No such reasons were filed in the instant case.

The questions to be resolved in the Wisconsin appellate court were the same as they are now:

1.) Whether Judge Wasielewski, without a jury, an independent prosecutor, the beyond a reasonable doubt standard of proof and notice, abused his "inherent power," by violating Ms. Schultz's *6th and 14th Amendment Constitutional rights*, when he conducted a four day criminal proceeding, requiring elaborate and confusing fact finding, on whether Ms. Schultz had committed the crime of dognapping and had attempted to suborn perjury in both the criminal case and the instant civil case and;

2.) Whether Judge Wasielewski abused his "inherent power," by violating Ms. Schultz's and ALI's *5th and 8th Amendment Constitutional rights*, when he took Ms. Schultz's and ALI's statutory and constitutional right to a jury in the civil case by taking Ms. Schultz's and ALI's valid causes of action, that the Journal valued in the "multiple-millions of dollars" and that Judge Wasielewski confirmed "ought to have been heard by a jury" who "could well have come in with a substantial verdict", to severely "penalize" Ms. Schultz to "deter future misconduct," to "maintain its (the court's) integrity" and to "maintain the court's dignity"and;

3.) Whether Judge Wasielewski abused his "inherent power," by violating Ms. Schultz's and ALI's *8th Amendment Constitutional rights*, when, after concluding that there was "no prejudice" or harm caused to the case or to the Journal, he punished Ms. Schultz by taking undefeated and valuable claims and by imposing another excessive $168,944.97 fine that, while made payable to the Journal, did not compensate the Journal for actual losses sustained and;

4.) Whether Judge Wasielewski abused his "inherent power," by violating Ms. Schultz's *5th, 8th, and 14th Amendment Constitutional rights* when he impaired Ms. Schultz's and ALI's statutory right to appeal by *sua sponte* ordering that Ms. Schultz and ALI pay the Journal's attorney fees for "as long as this issue is alive, until there is a final judgment entered from which no appeal is taken,"and;

5.) Whether Judge Wasielewski violated Ms. Schultz's

14th Amendment due process rights by failing to act as an impartial and unbiased magistrate. [Pet:195-292]

In an opinion, that recklessly misstated numerous facts in the record and arguments in the appellants' pleadings,[24] the court of appeals, relying entirely on *Chambers v. Nasco, 501 U.S. 32 (1991)*, did not undertake an analysis on whether the proceeding was criminal or civil in nature and, instead, held that Judge Wasielewski's "inherent powers" authorized him "to hold an evidentiary hearing and to make credibility determinations" to determine if he was the "victim of fraud."[25]

On November 4, 2000, Ms. Schultz and ALI filed separate petitions for review with the Wisconsin Supreme Court [Pet:140-94]. The Journal's response grossly distorted the facts in the record and Mr. Schultz, in his garnishment action, moved the Wisconsin Supreme Court for to impose sanctions against the Journal, pursuant to *§802.05 Wis. Stat.*, for filing false pleadings with the court. [Pet:316-376][26] The Wisconsin Supreme Court denied review and, at the same time, disclosed that Justice Diane Sykes (former Journal reporter and wife of Charlie Sykes) and Justice Crooks (a justice against whom Ms. Schultz had run a campaign) had withdrawn from the decision [Pet:1-2]. Justice Abrahamson and Justice Bradley, both against whom Ms. Schultz had run campaigns, did not

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[24]The appellate opinion's numerous misstatements of the record and of appellants' pleadings necessitated the inclusion of the petitioners' entire appellate briefs in the appendix to this petition. [Pet:140-289]. It should be noted that Wisconsin appellate courts have the benefit of reviewing petitions to the Wisconsin Supreme Court for the purpose of reconsidering their opinion.

[25]The court of appeals accepted Judge Wasielewski's factual finding that no fraud on the court took place. [Pet:31]

[26]The Journal asked the court to strike the motion claiming that Mr. Schultz had "no standing." The Wisconsin Supreme Court, with Justice Prosser dessenting, did not strike but did not consider the motion. [Pet:377-78]

withdraw from deciding whether to grant review, however, and Ms. Schultz filed a motion to reconsider asking that Justice Abrahamson and Justice Bradley withdraw from deciding the motion [Pet:300-315]. As grounds for reconsideration, Ms. Schultz cited the newly discovered evidence that Judge Dykman, the author of the appellate court opinion, was communicating with the Journal Sentinel to get favorable press for his run for Wisconsin Supreme Court while he was considering the appeal of this case, that Judge Vergeront had failed to disclose that she was the sister of a political operative whose public personal confrontation with Ms. Schultz forced him to step down from his position in a campaign and that a false and prejudicial supreme court memorandum about Ms. Schultz to all Wisconsin judges, had never been retracted. She asked the three remaining justices, who had no conflicts, to remand the case back to a panel of appellate court judges who were not prejudiced or conflicted in interest. Ms. Schultz also asked the court, in her response brief [Pet:437-61], for guidance on how to handle newly discovered evidence indicating that the same Journal lawyer, who had permitted Engel to lie in his deposition to cover up his calls to the Journal for money, had arranged the delivery of $900.00 in cash to pay a debt belonging to Clary Engel. [Pet:457-61] Justice Abrahamson and Bradley refused to withdraw from considering the motion for reconsideration and the motion was denied.

REASONS FOR GRANTING THE WRIT

THIS WRIT SHOULD BE GRANTED BECAUSE THE WISCONSIN COURT OF APPEALS, IN A PUBLISHED OPINION, HAS DECIDED IMPORTANT FEDERAL CONSTITUTIONAL QUESTIONS THAT CONFLICT WITH DECISIONS IN UNITED STATES COURTS OF APPEALS, OTHER STATE COURTS OF LAST RESORT AND WITH RELEVANT DECISIONS OF THIS COURT.

The predictions of Justices Rehnquist, Kennedy, Scalia and Souter, in their dissenting opinions in *Chambers v. Nasco*, 501 U.S. 32 (1991), have all come to fruition in this one case

where a Wisconsin court of appeals relied and expanded upon the holdings in *Chambers* to brush aside a *de novo* review[27] on whether Ms. Schultz's and ALI's due process rights were violated by an elaborate criminal fact finding proceeding and by grossly excessive, non-compensatory sanctions and to uphold the trial court's use of his "inherent powers" to impose severe and drastic sanctions for pre-litigation criminal conduct in a two year old criminal case[28] [Pet:18-19]. These issues were not resolved by the Wisconsin Court of Appeals because, in a discretionary review, expansively deferential to the trial court, the court circumvented deciding whether the proceeding and sanctions were civil or criminal in nature by publishing a circular opinion that said that, because the sanctions were "so severe" and the allegation of misconduct was "so serious," due process required no more than an "evidentiary hearing" in which guilt needed not be established beyond a reasonable doubt because "no criminal complaint issued, no loss of liberty was at stake, and no criminal jeopardy attached." [Pet:24-25]

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[27](De Novo review of due process claims is nothing less than a "duty of constitutional adjudication.") *Haynes v. Washington*, 373 U.S. 503, 515 (1963), ("..the question of whether a fine is constitutionally excessive calls for the application of a constitutional standard to the facts of a particular case, and in this context de novo review of that question is appropriate.) *United States v. Bajakajian*, 524 U.S. 321, 336-37 (1998) (*14th Amendment Due Process Clause* requires that state courts of appeals apply a de novo standard when reviewing the constitutionality of sanctions.) *Cooper v. Leatherman*, 121 S.Ct. 1678 (2001). (Discretionary review of excessive punitive damages "invite[s] extreme results that jar one's constitutional sensibilities.") *Pacific Mutual v. Haslip*, 499 U.S. 1, 18 (1991) (Court of Appeals reviews de novo trial court's characterization of proceedings as civil and not criminal in nature) *Bush Ranch v. DuPont*, 99 F. 3d 363, 367 (1996).

[28]The court of appeals found that the sanctions were not "primarily" punishment for pre-litigation conduct [Pet:18]. However, their own opinion relied solely on evidentiary matters relating only to the alleged pre-litigation misconduct [Pet:24-30] and ignored Judge Wasielewski's own findings that the punishment would have been much less if Ms. Schultz would not have been "defiant" and instead admitted guilt in the alleged subornation of perjury in the criminal case. [Pet:418]

"Law is fundamentally about boundaries. One of the most profound boundaries our justice system has drawn is that between the terrain of civil and criminal law." *Redrawing the Criminal-Civil Boundary, 2 Buff. Crim. L.Rev. 679 (1999)*. When that boundary was transgressed, in the instant case, it resulted in a wholesale destruction of constitutional rights that undermined this Court's and Congress' progression towards drawing closer the limitation upon a trial court's ability to impose grossly excessive punishment without the procedural safeguards appropriate to a criminal trial.[29]

In *Hicks v. Feiock, 485 U.S. 624, 625 (1988)*, this Court held that whether a proceeding and the relief given is properly characterized as civil or criminal in nature, for purposes of determining proper applicability of federal constitutional protections, "raises a question of federal law rather than state law." In *Hicks*, this Court looked to state law for guidance in determining the nature of the proceeding. The proceeding and the sanctions in the instant case, however, were not authorized by state statute and were imposed contrary to existing Wisconsin case law [A:AP:132].[30] Additionally, the appellate court, relied almost entirely on *Chambers* as authority to uphold the trial court's sweeping use of his inherent powers in the instant case. Thus, this Court, in considering the nature of

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[29]*United Mine Workers v. Bagwell*, 512 U.S. 821 (1994), *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), *Cooper Industries, Inc. v. Leatherman*, 121 S. Ct. 1678 (2001), *United States v. Halper*, 490 U.S. 435, 448 (1989), *Young v. Vuitton*, 481 U.S. 787 (1987), *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Degen v. United States*, 517 U.S. 820 (1996), *Austin v. United States*, 509 U.S. 602 (1993). In 1994 , Congress limited contempt fines, imposed for contempts that are also crimes, to $1,000.00 *18 USCA 402* [Pet:137-38] and guaranteed jury trials for indirect contempts that are also crimes *18 USCA 3691*. *[Pet:139] SS402 and 3691* apply in state as well as federal courts.

[30]The court of appeals ignored the contradicting Wisconsin case authority of *City of West Allis v. Wisconsin Electric Power Co.*, 248, Wis. 2d 10, 635 N.W. 2d 873 (2001) (where there is no prejudice, a sanction is unreasonable), and *Vis v. Cushman, Inc.*, 248 Wis. 2d 982, 638 N.W. 2d 393 (2001) (unpublished) (court must consider prejudice to the complaining party before dismissal for dilatory conduct).

the proceedings and sanctions in the instant case, is only constrained to the extent that Wisconsin's inherent powers doctrine conflicts with the inherent powers granted to federal courts. In that regard, the limitations on the application of Wisconsin's inherent powers doctrine is identical to that of federal courts. That is that trial courts may only use their"inherent powers" out of necessity[31] and with great restraint[32] to prevent the abridgment and negation of those

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[31](Inherent powers are those "which must necessarily be used to enable the judiciary to accomplish its constitutionally or legislatively mandated functions.") *City of Sun Prairie v. Davis*, 226 Wis. 2d 738, 747-748, ((1999). (inherent powers "are those which 'are necessary to the exercise of all others' ") *Roadway Express, Inc. v. Piper*, 447 U.S., at 764; ((SCALIA, J., concurring in judgment) inherent powers only those "necessary to permit the courts to function"). *Young v. United States ex rel. Vuitton et Fils, S.A.*, 481 U.S. 787, 819-820, (1987)

[32](Before imposing the "extremely drastic penalty" of dismissal, "circuit courts must use their authority with restraint and should consider whether there are less severe sanctions that would adequately deter and punish the misconduct.") *Hudson*, 194 Wis. 2d at 542 [Pet:19] (".A district court may not rely on its inherent power to impose a sanction of either default or dismissal without explaining why lesser sanctions were likely to be ineffective.") *Shepherd v. American Broadcasting Cos., Inc.*, 62 F.3d 1469, 1477 (D.C. Cir. 1995); ([t]he district court must, before dismissing an action under its inherent powers, consider less drastic sanctions) *Aoude v. Mobile Oil Corp.*, 892 F.2d 1115, 1118 (1st Cir. 1989) (The 9th Circuit directed the district court to provide "a reasonable explanation of possible and meaningful alternatives" to dismissal.) *Halaco Eng'g Co. v. Costle*, 843 F. 2d 376, 381 (9th Cir. 1988) (... "the district court should consider whether the other party has been prejudiced by the misconduct, whether the sanction is proportionate to the transgression, and whether the misconduct is abusive to the judicial process. Importantly, the court should first consider the adequacy of a less severe sanction.) *Dettrich v. Northwest Airlines, Inc.*, 168 F. 3d 961, 964-65 (7th Cir. 1999) (In dismissing a case pursuant to its inherent power a court must determine: existence of certain extraordinary circumstances; presence of willfulness, bad faith or fault by offending party; efficacy of lesser sanctions; relationship or nexus between misconduct drawing the dismissal sanction and matters in controversy in the case; prejudice to the party victim of the misconduct; and government interests at stake.) *Sun World v. Liarazu Olivarria*, 144 F.R.D. 384 (E.D. Cal. 1992); "only the least possible power adequate to the end proposed" should be used in contempt cases." *Young v United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 795-96 (1987)

constitutional rights reserved to individuals.[33]

In the instant case, the limits on "inherent" powers were clearly breached when, without restraint[34] and without necessity,[35] Judge Wasielewski invoked his "inherent powers" to conduct elaborate fact finding proceedings, that were criminal in nature, to impose severe and drastic penalties, that were not calibrated to damages, to punish Ms. Schultz and the Animal Lobby, Inc. for a crime that had no bearing on the case and that he found had been committed outside of the presence of the court and a year before the civil litigation was brought.

This Court has laid down the law to prevent a person's due process rights from being violated in certain proceedings. In *Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 444 (1911)*, this Court held that, where the sanctioned act is also a crime, the offender must be presumed innocent and guilt must be proved beyond a reasonable doubt. *In re Michael*, 326 U.S. 224, 228 (1945), this Court held that, when perjury is committed in or out of court, the perjurer requires the protections of the criminal process unless the "obstruction" element is present. In *Ex parte Hudgings*, 249 U.S. 378, 382-84 (1918), this Court defined the elements for "obstruction to the Court in performance of its duty" as being an obstructive act done in

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[33]("[e]ven a sensible and efficient use of supervisory power...is invalid if it conflicts with constitutional or statutory provisions.") *Thomas v. Arn*, 474 U.S. 140, 148 (1985). ("the [inherent] power must not abridge or negate those constitutional rights reserved to individuals.") Jacobson v. A.P. Avestruz, 81 Wis.2d 240, 247, (1977).

[34]The appellate court, in the instant case, gave the impression that the trial court undertook the required lesser sanctions analysis when, quite obviously, it did not.

[35]The court of appeals recognized that there was no necessity, in the instant case, when it said: "It would have been much easier for the circuit court to simply deny the Journal's motion to dismiss, allow the jury to sort everything out, and perhaps refer the Journal's allegations to the district attorney's office." [Pet:21]

the presence of the court. In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), this Court held that any fact that increases penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. In *United Mine* Workers v. Bagwell, 512 U.S. 821, 838 (1994), this Court held that when sanctions are serious and not calibrated to damages, the disinterested factfinding and evenhanded adjudication of a jury are essential. In *Young v. Vuitton*, 481 U.S. 787 (1987), this Court held that the error of permitting an interested party to prosecute contempt is error so fundamental and pervasive that it requires reversal without regard to the facts or circumstances of the case. Young, 481 U. S. at 809.

The proceeding, in the instant case, is a criminal proceeding. While the court of appeals changed the trial court's findings of attempted subornation of perjury to findings of litigation misconduct [Pet:24-25], the fact is that the publicly filed judgment clearly says that Ms. Schultz committed the crimes of subornation of perjury and perjury [Pet:3-5][36] which carry with them a stigma and the moral condemnation of the community. Furthermore, the Journal's own reliance on the privileged court findings to publicize, on their front page, that Ms. Schultz attempted to "suborn perjury" from her "friend" "with a felony criminal record"[159:ex:1], is perhaps the most powerful demonstration on why a sanctioned act, that is also a crime, must be proved beyond a reasonable doubt *Gompers* at 444.

In addition to the purpose of the proceeding being to determine whether Ms. Schultz was guilty of a crime, it is undisputed that, from the very beginning, the sole objective of the proceeding was not to make the Journal whole or to compensate the Journal for losses sustained – the necessary

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[36]Although the judgment, drawn up by the Journal, states that Ms. Schultz committed perjury, the trial court specifically found that she did not commit perjury.

element of a civil proceeding. U.S. v. Mine Workers, 330 U.S.258, 303-04 (1947). The sole purpose of the proceeding was to determine whether Ms. Schultz was guilty of a crime and then to punish her for that crime with the purely punitive sanction of dismissal. Judge Wasielewski specifically said that, although there was "no prejudice" to the case or to the Journal [Pet:71], he was taking Ms. Schultz's and ALI's causes of action,[37] that the Journal valued in the "multiple-millions of dollars" [208:45, 212:101-03,210:64] and that Judge Wasielewski confirmed "ought to have been heard by a jury" who "could well have come in with a substantial verdict" [Pet:93], and that he was giving those causes of action to the Journal to "penalize" Ms. Schultz, to "deter future misconduct"[38] [Pet:70,81] and to "maintain the court's integrity" [Pet:72].[39] Likewise, the court of appeals repeatedly confirmed that the

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[37]In Societe Internationale v. Rogers, 357 U.S. 197, 209 (1958), this Court explained that "There are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity to be heard on the merits of his cause." A cause of action, that has accrued, is a vested property right in Wisconsin and is protected by the 14th Amendment's due process clause. Martin v. Richards, 192 Wis.2d 156, 206, 531 N.W.2d 70, 91 (1995). In Logan v. Zimmerman Brush Co., 455 U.S. 422, 428 (1982), and Martinez v. California, 444 U.S. 277, 281-82 (1960), this Court held that a cause of action is a species of property protected by the Fourteenth Amendment. The Wisconsin Constitution also provides an inviolate right to a jury trial in a civil case and Wisconsin statute provides for a statutory right to appeal. Those are rights protected by the due process clause of the United States Constitution.

[38]In Falstaff Brewing v. Miller Brewing, 702 F.2d 770, 780 (1983), the 9th Circuit held that the language of the court's orders, that it was imposing sanctions to "deter others from engaging in similar conduct" and to "penalize" Falstaff, reflected the court's intent to impose criminal sanctions.

[39]The test on whether a sanction is punitive, as formulated by the Shillitani Court, is "what does the court primarily seek to accomplish by imposing [the sanction]?" 384 U.S. at 370. In Douglass v. First Nat'l Realty Corp., 543 F.2d 894, 898 (D.C.Cir.1976) the court held: (if the purpose of the relief sought is to punish defiance of the court's authority, then the relief sought is punitive whatever its form; if civil, fine must be compensatory);

taking of the case was to "maintain the dignity" of the court. Clearly, from the very beginning of the proceeding, the trial court sought to vindicate his authority with the purely punitive sanction of dismissal. These are the markings of a criminal proceeding that, when present, mandate a jury, an independent prosecutor and proof beyond a reasonable doubt. In *Harris v. City of Philadelphia*, 47 F.3d 1311 (1995), the 3rd Circuit held that the trial court's dismissal of a motion to modify was an inappropriate sanction for either civil contempt or discovery misconduct because the sanction was "not compensatory" nor "designed to have a coercive effect" thus making the sanction criminal in nature. The court said: "We will not sustain the dismissal of the Motion to Modify as a sanction for criminal contempt, because it is evident that the requisite procedural protections, in particular a jury trial, were not accorded." *Harris at 1329* In *Hovey v. Elliot*, 167 U.S. at 419 (1897), this court said: "If the court had the power to do this by denying the right to be heard to the defendant, what plainer illustration could there be of taking property of one and giving it to another without hearing or without process of law?"

It was a violation of due process for the Journal to serve as the prosecutor in the criminal proceeding and they could not recover fees for prosecuting Ms. Schultz. While an award of expenses to prosecute a civil sanction proceeding is permissible, it is well settled that such an award is independent of any award of compensatory damages *Shakman v. Democratic Organization of Cook County*, supra, 533 F. 2d at 351 and; *Hecht v. Don Mowry Flexo Parts, Inc.*, 111 F.R.D. 6, 9 (N.D. Ill. 1986). In the instant case, it was not until the purely punitive sanction of dismissal was imposed, through a criminal proceeding, that the Journal asked for their fees for prosecuting Ms. Schultz for attempted subornation of perjury, for prosecuting their motion to get their fees for prosecuting Ms. Schultz and for collecting on the judgment that they anticipated getting for prosecuting Ms. Schultz. Thus, the fee award, not calibrated to damages, only heightened the prejudice that was already caused by the Journal acting as the prosecutor in the proceeding that was clearly a criminal bench

trial on subornation of perjury. In *Young v. Vuitton*, 481 U.S. 787 (1987), this Court held that the error of permitting an interested party to prosecute contempt is error so fundamental and pervasive that it requires reversal without regard to the facts or circumstances of the case. Young, 481 U. S. at 809. In *Universal Oil v. Root Refining*, 328 U.S. 575, 580 (1946), this Court held that if the rights of parties are to be adjudicated in an investigation for fraud, "the usual safeguards of adversary proceedings must be observed." One of those rights is that an:

> "Amici selected by the court to vindicate its honor ordinarily ought not be in the service of those having private interests in the outcome. Certainly it is not consonant with that regard for fastidiousness which should govern a court of equity, to award fees and costs of amici curiae who have already been compensated by private clients so that these be reimbursed for what they voluntarily paid." *Universal* at 581

The sanctions in this case are criminal in nature. In *U.S. v. Mine Workers*, 330 U.S.258, 303-04 (1947), this Court held that for a sanction to be civil, it must be to compensate for "losses sustained." In *United Mine* Workers v. Bagwell, 512 U.S. 821, 838 (1994), this Court held that when sanctions are serious and not calibrated to damages, the disinterested factfinding and evenhanded adjudication of a jury are essential. In the instant case, however, the court of appeals concluded that *Bagwell* was inapposite[40] because this Court did

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[40]The court also said that *Bagwell* was inapposite because it was "highly fact intensive" and because the monetary sanctions, in the instant case, were payable to the Journal for "prosecuting its motion to dismiss." It was first a misstatement of the record for the appellate court to say that the judgment did not exceed the amount the Journal spent to "prosecute its motion to dismiss" because the record clearly demonstrates the opposite. Second, the proceedings, in the instant case, were so fact-intensive and so confusing that the court of appeals opinion contained over twelve errors in interpreting the facts in surrounding the proceeding..

not indicate that *Bagwell* was limiting the holdings of *Chambers*.[41] Other Courts, however, have found that this Court's "....concerns about the reliability of the fact finder and the rights of the alleged contemnors that *Bagwell* so powerfully articulates are applicable well beyond the cases within its ambit." *Cornel Law Review*, 81 Cornell L. Rev. at 218. (1995) Appellate courts from the 2nd, 9th and the 11th Circuits have applied *Bagwell* in sanction cases where trial courts have used their "inherent powers" to impose severe sanctions without the procedural protections appropriate to a criminal case.[42] Indeed, in a closely analogous setting, the 2nd Circuit, in *Mackler Productions, Inc. v. Cohen*,146 F.3d 126, 128 & 129 (1998), held:

> Although contempts and sanctions are not identical, the Supreme Court's efforts in Bagwell [512 U.S. 821] to distinguish between civil and criminal contempts can be helpful in identifying those sanctions that demand

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[41] Aside from the fact, that Chambers also does not stand for the proposition that a trial court has the "inherent power" to impose sanctions, that are not measured to the losses sustained, it is black letter law that bad faith attorney fees awards are only permitted to make the aggrieved party whole and "are limited to those expenses reasonably incurred to meet the other party's groundless, bad faith proceedural moves." *Browning Debenture Holders' Committee v. DASA Corp.*, 560 F. 2d 1078, 1089 (2d Cir. 1977) Synanon Foundation, Inc. v. Bernstein, 517 A.2d 28 (1986). (D.C. Court of Appeals)

[42] ("The more punitive the nature of the sanction, the greater the protection to which an individual is entitled.") F.J. Hanshaw Enterprises, Inc. v. Emerald River Development, 244 F.3d 1128, 1137 (9th Cir. 2001), Bush Ranch v. DuPont, 99 F. 3d 363, 368 (1996) *See Blalock v. United States*, 844 F.2d 1546, 1560 n. 20 (11th Cir.1988) (per curiam) (Tjoflat, J., specially concurring) ("It requires no citation of authority to say that a district court may not, even unwittingly, employ a civil contempt proceeding to impose what, in law, amounts to a criminal contempt sanction.... When a district court employs civil contempt procedures to punish a contemner, it necessarily deprives the contemner of his constitutional rights and renders his contempt citation a nullity.").

> criminal procedural protections....[S]anctions and contempts raise certain similar concerns. Whether or not a finding of contempt is involved, unfairness and abuse are possible, especially if courts were to operate without any framework of rules or caps on their power to punish. In either case, the individual bears the risk of substantial punishment by reason of obstructive or disobedient conduct, as well as of vindictive pursuit by an offended judge. We conclude, notwithstanding the differences mentioned above, that the imposition of a substantially punitive sanction requires that the person sanctioned receive the procedural protections appropriate to a criminal case.

In this first *Mackler* appeal, The 2nd Circuit, relying on *Bagwell*, remanded the imposition of a court payable $10,000.00 fine back to the district court to implement procedural protections appropriate to a criminal proceeding and remanded the imposition of a $45,000.00 attorney fee award to the District Court to determine whether the fees were the result of actual damages. When the trial court, on remand, decreased the fine to $2000.00, did not apply procedural protections appropriate to a criminal case and did not determine if the $45,000.00 was to compensate for damages sustained, the 2nd Circuit Court of Appeals, in *Mackler Productions Inc. v. Cohen*, 225 F.3d 136, 143 (2d Cir. 2000), used its supervisory powers to reverse the lesser $2000.00 punitive sanction and again remanded the $45,000.00 back to the trial court for a determination on whether the $45,000.00, payable to the opposing litigant, was the result of actual damages sustained by an alleged subornation of perjury that was already admitted to in a criminal case. In the last episode of the *Mackler* saga, a new District Judge, in *Mackler Productions, Inc. v. Turtle Bay Apparel Corp., No. 92 Civ 5745 DC., 2001 WL 892815 (August 6, 2001)*, conducted a hearing to determine if there were damages resulting from the perjury that was proved in the criminal case. The District Court concluded that,

because the entire case hinged on the perjury, that was given at trial, the plaintiff was harmed because the case would have never gone to trial without the perjured testimony. Thus, the court found that attorney Cohen multiplied the proceedings by $46,750.00.

The court of appeals, in the instant case, ignored the remand of the $45,000.00 sanction in *Mackler* and found that Mackler was "inapposite" because the $10,000.00 sanction was not payable to the opposing litigant.[43] Furthermore, this Wisconsin Court of Appeals, obviously does not agree with this Court's vigilance in putting the constitutional rights of individuals ahead of a court's interest in maintaining it's "dignity" because its opinion is in direct contrast with Justice Ginsburg's and Chief Justice Rehnquist's concurrence in *Bagwell*, 512 U.S. at 847 where they noted that, since the Virginia Supreme Court's recognition of the fines were to uphold the dignity of the law and public respect for the judiciary, it was enough to indicate that the sanctions were punitive and criminal in nature. In the instant case, the Court of Appeals held that the sanctions did not have to be calibrated to damages "because the court's ability to maintain judicial integrity was compromised regardless whether the Journal was harmed" [Pet:17] and that Judge Wasliewski could impose sanctions, not calibrated to damages, to "maintain his dignity" in both this civil case an in another criminal case. [Pet:11,15,16] Thankfully, this court has *never* put the "dignity" of the court ahead of the constitutional rights of an individual. In *Bloom v. Illinois*, 391 U.S. 194, 208 (1968), this Court held:

> "We cannot say that the need to further respect for judges and courts is entitled to more consideration than the interest of the individual

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[43]Ms. Schultz repeatedly described the Mackler cases in her briefs[Pet:168-70,188-89, 191, 214-15] and Mr. Schultz addressed the court's failure to correctly interpret the case in his motion for sanctions. [Pet:329-331].

> not be subjected to serious criminal punishment without the benefit of all the procedural protections worked out carefully over the years and deemed fundamental to our system of justice. Genuine respect, which alone can lend true dignity to our judicial establishment, will be engendered, not by the fear of unlimited authority, but by the firm administration of the law through those institutionalized procedures which have been worked out over the centuries."

It should be no surprise to this Court that the goal of maintaining the "dignity" and "integrity" of the court was not reached in this case. Most disturbing, however, is that this case is now a lead case distinguishing *Bagwell* – a case that, for the first time, brought rule-of-law concerns to the fore in inherent powers cases. Additionally, the appellate court opinion, in this case, has now given legs to the *Chambers* finding that has been construed as giving trial courts the "inherent power" to sanction pre-litigation misconduct. It is for these reasons, that this case is an apt case in which to advance rule-of-law concerns as part of contempt and inherent powers distinction analysis.

CONCLUSION

For the foregoing reasons, the judgment of the Wisconsin Court of Appeals should be reversed.

Dated at Mequon, Wisconsin, this 25th day of April, 2002.

Respectfully submitted,

Cynthia A Schultz, *acting pro se*

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